

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

IN THE MATTER OF APPLICATION NOS. 42B- 30011045 AND 42B-30014358 FOR BENEFICIAL WATER USE PERMITS BY FIDELITY EXPLORATION)))))	PROPOSAL FOR DECISION
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Pursuant to the Montana Water Use Act (Mont. Code Ann. § 85-2-101 et. seq.) and to the contested case provisions of the Montana Administrative Procedures Act (Mont. Code Ann. § 2-4-101 et. seq., and after notice required by Mont. Code Ann. § 85-2-307, a hearing in the above titled matter was held in Helena, Montana, on March 5, 2007, continuing to March 6, 2007. The purpose of this hearing was to determine whether Applications for Beneficial Water Use Permit Nos. 42B-30011045 and 42B-30014538 should be approved to Fidelity Exploration and Production Company (Fidelity), in accordance with the requirements set forth in the Montana Water Use Act (more specifically defined for each application below).

APPEARANCES

Fidelity appeared at the hearing by and through counsel, Donald D. MacIntyre and K.D. Feeback. Testifying on behalf of Fidelity was Bruce Williams, Mark Brooke, Kevin Harvey, and Tom Osborne. Objector Northern Plains Resource Counsel (NPRC) appeared at the hearing by and through counsel, Jack R. Tuholske. Testifying on behalf of NPRC was Mark Fix. Objectors Brown Cattle Company and Tongue River Water Users Association (TRWUA) appeared at the hearing by and through counsel, Brenda Lindlief-Hall. Testifying on behalf of TRWUA was Art Hayes. Objector State Water Projects Bureau (SWPB) appeared at the hearing by and through counsel, Fred Robinson. Objector Terry Punt appeared at the hearing *pro se*.

EXHIBITS

Fidelity offered and I admitted the following exhibits into evidence:

- **Prefiled Direct Testimony of Bruce Williams and the exhibits contained therein.**
Consisting of Bruce Williams' prefiled direct testimony and, **A1** - a copy of a document entitled "Coalbed Natural Gas Development on Your Land From Start to Finish" consisting of 6 pages, **A2** – a copy of what appears to be portions of a document entitled "Montana's State Water Plan 1987 – 1999" consisting of 36 pages, **A3** – a map which appears to be a depiction of Fidelity's CX field showing the existing and proposed infrastructure consisting of 1 page, **A4.1 – A4.11** – copies of various "Water Distribution

Contracts” and “Water Agreements” consisting of 32 pages, **A5** – an unsigned and undated copy of “State Water Projects Bureau Responses to Fidelity Exploration & Production Company’s First Discovery Requests” consisting of 6 pages, **A6** – a copy of at least portions of a document entitled “Montana Water Plan Management Section – Final” dated February 1989 consisting of approximately 122 pages and 1 map, **A7**- a copy of a document entitled “Montana Water Plan Management Section – Final – Subsection: Agricultural Water Use Efficiency” dated February 1989 consisting of 2 pages.

- **Prefiled Direct Testimony of Mark Brooke and A10, A11 and A12.** Consisting of Mark Brooke’s prefiled direct testimony and, **A10** – a copy of a spreadsheet showing the volume of water stored in a portion of Fidelity’s pipeline system consisting of 1 page, **A11** – a document titled “CX Field Monthly Production Data” consisting of 2 pages, **A12** – four graphs depicting Fidelity’s operations titled “Montana CBNG Production,” “Number of Producing CBNG Wells in Montana,” “Montana CBNG Water Production,” and “Montana Average CBNG Water Production,” consisting of 2 pages.
- **Prefiled Direct Testimony of Kevin C. Harvey and A8, A9.1 – A9.4A and B.** Consisting of Kevin C. Harvey’s prefiled direct testimony and, **A8** – two documents titled “Managed Irrigation for the Beneficial Use of Coalbed Natural Gas Produced Water: The Fidelity Experience” and “2006 Summary Report Tongue River Agronomic Monitoring & Protection Program” totaling 22 pages, **A9.1 – 9.4A and B** – a series of three Technical Memoranda related to site and soil monitoring results for the Young’s Creek Ranch, Dewy, and Seven Brothers Ranch areas plus two maps which appear to show some of Fidelity’s infrastructure consisting of a total of 65 pages,
- **Prefiled Direct Testimony of Tom Osborne and A15 and A16.** Consisting of Thomas J. Osborne’s prefiled direct testimony and, **A15** – titled “Table 4. 2005 Actual Soil Water Balance for the 7BS Pivot 128 area” consisting of 1 page, **A16** – titled “Table 2. 2005 Actual Soil Water Balance for the 7BN Ranch Header 2 area” consisting of 1 page.
- **A13** – An affidavit of Susan Cottingham certifying that the attached letter dated August 9, 2002 from Anne W. Yates to Jason Whiteman is an authentic, true and correct copy of the letter on file with the Montana Reserved Water Rights Compact Commission consisting of 12 pages, was admitted over objection of NPRC, TRWUA and Brown

Cattle Company.

- **A14** – An affidavit of Susan Cottingham certifying that the attached letter dated August 28, 2003 from Chris D. Tweeten to Jeanne S. Whiteing is an authentic, true and correct copy of the letter on file with the Montana Reserved Water Rights Compact Commission consisting of 3 pages, was admitted over objection of NPRC, TRWUA, and Brown Cattle Company.

NPRC offered and I admitted the following exhibits into evidence:

- **NP-5** – A map showing the approximate location of the ranch owned by Mark Fix consisting of 1 page.
- **NP-6** – A compilation of data water quality and flow from the USGS Gage Tongue River at Miles City, MT consisting of 15 pages, over objection of Fidelity.
- **NP-7** – A series of charts showing discharge and specific conductance at the USGS Gage Tongue River at Mile City, MT, consisting of 8 pages, over objection of Fidelity.

TRWUA offered and I admitted the following exhibits into evidence:

- **TR-2** – A copy of the Northern Cheyenne – Montana Compact consisting of 15 pages, also found at Mont. Code Ann. § 85-20-301 et seq.
- **TR-4** – A copy of a letter from Jeanne S. Whiteing to Ann [sic] Yates dated July 21, 2003, consisting of 2 pages.
- **TR-5** – A copy of a “Water Purchase Contract” form, a copy of the “Water Marketing Contract between the State Water Conservation Board of the State of Montana and the Tongue River Water User’s Association,” dated 1 July, 1937, and a copy of “Amendatory, Supplemental and Clarifying Water Marketing Contract between the State Water Resources Board of the State of Montana and the Tongue River Water User’s Association,” date 13 March, 1969, consisting of a total of 32 pages.

TRWUA offered and I refused the following exhibits:

- **TR-3** – A copy of a letter between Eugene Little Coyote and Art Hayes dated March 2, 2007.

Objector Punt offered and I admitted the following exhibits into evidence:

- **P-1** – Photographs of the Punt ranch property was admitted as being demonstrative of the conditions on the Punt property, consisting of 2 pages.
- **P-3** – A series of charts and letters pertaining to flow conditions between January 2004

to July 2006, of springs on or around the Punt property, consisting of 5 pages.

Objector Punt offered and I refused the following exhibits:

- **P-2** – Photographs purportedly showing the outfall from ponds related to the Decker Coal Mine, consisting of 1 page.
- **P-4** – A copy of an article from Big Cat Energy Corporation regarding their “ARID” process of producing coal bed methane gas, consisting of 3 pages.

PRELIMINARY MATTERS

Fidelity filed application Nos. 42B-30011045 and 42B-30014358 in order to allow them to put water produced by coal bed methane wells to beneficial use as provided in Mont. Code Ann. § 82-11-175. As an initial question presented by these applications, I asked the parties to brief two questions. First, what is the legal status of water extracted or produced through the exploration and development of Coal Bed Methane, and second, what specific sections of Mont. Code Ann. apply to each of the applications at issue in this matter? After thorough briefing by the parties, I issued an Order on the scope of issues for the hearing. (January 3, 2007, Order). In that Order I determined that “the hearing in this matter will be conducted by considering the water held in Fidelity’s pipeline and storage system as the source of the appropriation.” It was my determination that the Legislature intended “that water produced by [Coal Bed Methane] development is to be considered something other than ground water.” My January 3, 2007, Order should have clarified that *for purposes of obtaining a beneficial use permit pursuant to Mont. Code Ann. § 82-11-175*, the Legislature intended that water produced by Coal Bed Methane development is to be considered something other than ground water.

My January 3, 2007, Order also found that each of the applications are independent from the other because different criteria and standards of proof are applicable. For application No. 42B-30011045 the criteria of Mont. Code Ann. § 85-2-311(1) shall apply and the applicant must prove by a **preponderance of the evidence** that those criteria are met. For application No. 42B-30014358 the criteria of Mont. Code Ann. § 85-2-311(1) and § 85-2-311(4) shall apply and the applicant must prove by **clear and convincing evidence** that those criteria are met.

I explained at the hearing that preponderance of the evidence means evidence which is of greater weight or more convincing than the evidence offered in opposition to it, that is, more probable than not. Clear and convincing evidence is that evidence which results in a reasonable certainty of the truth of the ultimate fact in controversy, proof which requires more than a preponderance of the evidence but less proof than proof beyond a reasonable doubt.

Clear and convincing proof will be shown if the truth of the facts asserted is highly probable.

The hearing in this matter was conducted on both applications simultaneously with differences in criteria and level of proof pointed out as they arose.

APPLICATION 42B-30011045 (Montana Application)

Findings of Fact

General

1. Application for Beneficial Water Use Permit No. 42B-30011045 in the name of Fidelity Exploration and Production Company and signed by Michael L. Bergstrom, Environmental Manager, was filed with the Department on June 17, 2004. (Department file)
2. Notice of the Application was properly made in the *Big Horn County News* on June 6, 2006. (Department file)
3. The Environmental Assessment (EA) dated June 13, 2006, prepared by the Department for this application was reviewed and is included in the Department's file for this application. (Department file)
4. Fidelity seeks to obtain a Beneficial Water Use Permit to market water produced through the development of coal bed methane wells in the amount of 2400 gallons per minute (5.35 cubic feet per second) up to a volume of 3,863 acre-feet per year. Fidelity proposes to distribute water to potential users in Big Horn County, Montana in the area of the CX Field. The CX Field includes all sections in T9S, R39E; Sections 4 – 9 and Sections 17 – 36, T9S, R40E; S1/2 Section 35, T8S, R41E; and all sections in T9S, R41E. The proposed beneficial uses of the water are for water marketing (for industrial use, irrigation and stock watering). The proposed period of appropriation is from January 1 through December 31. (Department file, Application # 42B-30011045)
5. The CX field is located upstream and adjacent to the Tongue River reservoir. (Department file)
6. Objector NPRC's membership includes persons with water rights on the Tongue River downstream of the CX Field. (Testimony of Mark Fix at Vol. II 11:5 through 12:18; NP-5)
7. The Fix ranch is located more that 100 river miles downstream of the Tongue River Dam and reservoir. (Testimony of Mark Fix Vol. II 35:18 – 24; NP -5)

8. Objector TRWUA's membership includes persons with contract water from the Tongue River Water User's Association downstream of the CX Field. (Testimony of Mark Fix at Vol. II 11:5 through 12:18; NP-5; Testimony of Art Hayes at Vol. II 63:6 through 63:14)
9. The Hayes ranch is located approximately 40 miles downstream of the Tongue River Dam. (Testimony of Art Hays Vol. II 65:16)
10. Objector SWPB holds a water right on the Tongue River to store, control and/or divert all unappropriated water of the Tongue River for storage behind the Tongue River Dam for the purposes of marketing that water through the Tongue River Water Users' Association. (TR-5)
11. Objector Terry Punt has water rights on a tributary (Hanging Woman Creek) to the Tongue River which enters the Tongue River downstream of the CX Field. (Department file)

Physical Availability

12. The water Fidelity proposes to use is withdrawn from coal bed methane wells and is stored and or transported through Fidelity's closed pipeline system. In January 2007, the approximate yield of water produced from those wells is equivalent to 4,138 acre-feet per year. (Testimony of Bruce Williams, pp. 6)
13. The vast majority of the water produced from Fidelity's coal bed methane wells is currently discharged to the Tongue River under authority of two MPDES permits (one permit is for the discharge of untreated water in the amount of 1600 gpm from July – October, 2500 gpm from November – February, and 2350 gpm from March – June; the second permit is for treated water in the amount of approximately 650 gpm) with the remainder providing industrial use (mostly dust suppression) at the Spring Creek and Decker coal mines, and to local landowners for stock watering and wildlife uses. (Testimony of Bruce Williams, pp. 3)
14. Fidelity's pipeline facility essentially functions like a reservoir in that water is stored in the pipeline and there is a certain volume flowing into and out of it. Fidelity's pipeline system is a closed system limiting losses such as from evaporation. (Testimony of Mark Brooke, pp. 4 – 5)
15. As the number of wells and amount of coal bed methane production increases, the amount of water produced from that production increases. As of November 30, 2006, the amount of water produced from Fidelity's CX Field into the pipeline was

- 2,551 gallons per minute (gpm). (A-11, A-12)
16. The quantity of water produced from coal bed methane will not remain stable through the life of the gas field. As more wells are installed and more gas is produced, water quantity will increase. As the amount of gas produced over the years begins to decline, water production will concomitantly decrease. (A-1; Williams redirect at Vol. I 103:2 – 4)
 17. 2,551 gpm is equivalent to 4,115 acre-feet per year. (Hearing Examiner calculation)

Legal Availability

18. The water stored in and flowing through Fidelity's pipeline system is under the exclusive control of Fidelity and no person has access to those facilities to establish a senior water right. (Testimony of Bruce Williams at pp. 7)
19. While the Objectors raised the issue of a claim by the Northern Cheyenne Tribe to water produced from coal bed methane pursuant to the Water Compact between the State of Montana, the Northern Cheyenne Tribe, and the United States (Mont. Code Ann. § 85-20-301 et seq.), the position of the Montana Reserved water Rights Compact Commission on behalf of the State is that coal bed methane water is not part of the Tribal Water Right. (A-13; A-14)
20. There are no existing legal demands on the source of supply. The source of supply is water produced by Fidelity's development of coal bed methane which is withdrawn along with their gas under the jurisdiction of the Montana Board of Oil and Gas Conservation. (Testimony of Mark Brooke at pp. 7 – 8; Department File; Testimony of Bruce Williams at pp. 6)

Adverse Affect

21. The water that Fidelity intends to put to beneficial use is from the water stored in or passing through Fidelity's pipeline which cannot be relied upon by any other surface or groundwater user. (Testimony of Mark Brooke at pp. 7; Department file)

Adequacy of Appropriation Works

22. Fidelity's pipeline system is currently in place and being used to deliver water to permitted discharge points under MPDES permits issued by the Department of Environmental Quality. The system is dynamic and will grow and ultimately shrink as wells cease to produce coal bed methane gas. The system in place as of November 30, 2006, was handling 2,551 gpm. The system has been steadily growing since at

least 1999 and is expected to increase further as more gas wells are developed.
(Testimony of Bruce Williams at pp. 7; A-11)

Beneficial Use

23. The proposed beneficial use is for distribution or marketing of the water produced in conjunction with coal bed methane production. (Testimony of Bruce Williams at pp. 8; Department file; Testimony of Kevin Harvey at pp. 3)
24. Fidelity intends to distribute water from the pipeline to persons who enter into water distribution contracts with Fidelity. (Testimony of Bruce Williams at pp. 8; Testimony of Kevin Harvey at pp. 3)
25. Fidelity intends that the end beneficial uses in its marketing of water will be industrial use (dust suppression, process water, well drilling and completion, and fire control), agricultural use (irrigation, stock watering, and wildlife) (Testimony of Kevin Harvey at pp. 3 – 4; Department file)
26. Fidelity has committed to distribution contracts for approximately 1,500 acre-feet per year with two coal mines, eight surface owner/lessees and Seven Brothers Ranch. (Testimony of Bruce Williams at pp. 8) The record discloses firm distribution contracts consisting of:
 - a. Seven Brothers Ranch: 300 acre-feet per year for irrigation of 120 acres of alfalfa/grass at 30 inches per year; 2.25 acre-feet per year for 100 head of cattle at 20 gallons per day for watering/evaporation. (A-4.1)
 - b. Spring Creek Coal Company: up to 125 million gallons per year for dust control, fire control and process use. (A-4.2)
 - c. Decker Coal Company: 597 acre-feet per year. (A-4.3)
 - d. Charles Larsen: 13.44 acre-feet per year for 600 head of cattle at 20 gallons per day for watering. (A-4.4)
 - e. Fredrick Mueller: 3.36 acre-feet per year for 150 head of cattle at 20 gallons per day for watering. (A-4.5)
 - f. John Wilson: 6.72 acre-feet per year for 300 head of cattle at 20 gallons per day for watering. (A-4.6)
 - g. Lavon Conner: 1.12 acre-feet per year for 50 head of cattle at 20 gallons per day for watering/evaporation. (A-4.7)
 - h. Ranchholme Cattle LTD: 11.2 acre-feet per year for 500 head of cattle at 20 gallons per day for watering/evaporation. (A-4.8)

- i. Al and Deanna Visborg: 2.2 acre-feet per year for 100 head of cattle at 20 gallons per day for watering/evaporation. (A-4.9)
 - j. Fra Porter: 3.36 acre-feet per year for 150 head of cattle at 20 gallons per day for watering/evaporation. (A-4.10)
 - k. Rodney and Anita McCloy: 2.71 acre-feet per year for 121 head of cattle at 20 gallons per day for watering/evaporation. (A-4.11)
- 27. Fidelity intends to enter into further distribution contracts with landowners to use the produced water for both stock water and managed irrigation. Fidelity anticipates being able to sign agreements to provide up to 575 acre-feet for sites currently under investigation. (Testimony of Bruce Williams at pp. 8; NP-1; NP-2)
- 28. Managed irrigation is an irrigation practice which employs soil science, water chemistry, agricultural engineering and agronomic principles to utilize water produced from coal bed methane operations to produce forage while protecting soil physical and chemical properties. (Testimony of Kevin Harvey at pp. 4 – 5; A-8.1)
- 29. Managed irrigation has been successfully utilized in the Powder River Basin to grow crops. (Testimony of Kevin Harvey at pp. 5 – 7; A-9.1, 9.2, 9.3)

Possessory Interest

- 30. Fidelity has a possessory interest in the lands which comprise the CX Field and their pipeline system through their gas leases. (Testimony of Bruce Williams at pp. 9)
- 31. Other than water for its own use or for its subsidiary (Seven Brothers Ranch) Fidelity does not have a possessory interest in the property where a water distribution contract is appurtenant. (Testimony of Bruce Williams at pp. 8)
- 32. The state of Montana is the owner of water rights stored behind the Tongue River Dam. The Tongue River Water Users purchase 40,000 acre-feet from the State and then sell that water to individual water users. (TR-5; Testimony of Art Hayes Vol. II 89:16 – 96:25)

Water Quality

- 33. Water produced through the development of coal bed methane generally has low to moderate levels of salinity but elevated levels of sodium and bicarbonate ions. (A-8.1)
- 34. Elevated levels of sodium in coal bed methane produced waters has a potential adverse affect on soil infiltration and permeability, especially in soils with high clay content. (A-8.1)

35. The ratio of sodium to calcium and magnesium (sodium adsorption ratio or SAR) is used to measure the hazard related to sodium abundance. (A-8.1)
36. Bicarbonate present in irrigation water will react with available calcium and magnesium and form insoluble precipitates. This reaction raises the effective SAR of the water. High values of bicarbonate can also cause an increase in the pH and accompanying increases in SAR. (A-8.1)
37. Salinity (measured by electrical conductivity or EC or alternatively as specific conductance or SC) can inhibit plant growth by hindering the plant's ability to extract water from the soil. Plant species vary with respect to salt tolerance. (A-8.1; Testimony of Mark Fix at Vol. II 19:11 – 18)
38. Fidelity currently discharges both treated and untreated water produced from coal bed methane development directly into the Tongue River under the authority of two MPDES permits. (Testimony of Bruce Williams at pp. 3)
39. Chemical water quality of rivers is highly dependant on the flow at the time of sampling. (Hearing Examiner knowledge)
40. The chemical water quality parameters of rivers generally tend to decrease as streamflow increases and increase as streamflow decreases. (Hearing Examiner knowledge; Testimony of Mark Fix Vol. II 42:16 – 20)
41. The lowest EC values in the Tongue River at the Miles City gage occur when the river flow is high (over 1,000 cfs) and the highest EC values generally occur during periods of low flow. The highest river flow where the EC exceeded 1,000 was 590 cfs. (NP-6)
42. The EC levels in the Tongue River at the Miles City gage during June through the first half of September 2006 were greater than 1,000 most of the time. During that time period river flows did not exceed 27 cfs. (Testimony of Mark Fix Vol. II 25:11 – 21)
43. Fidelity's managed irrigation practices are designed to prevent and control irrigation runoff. (Testimony of Kevin Harvey at pp. 5; A-8.1)
44. Managed irrigation has been successfully utilized by Fidelity in Wyoming with no observable excessive runoff. (A-9.1; A-9.3)

Conclusions of Law

General

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of

- water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. (Mont. Code Ann. § 85-2-311(1))
2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seek to appropriate, in the amount requested, based on an analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. (Mont. Code Ann. § 85-2-311(1) (a) – (h))

Physical Availability:

3. Fidelity has proven by a preponderance of the evidence that the water applied for is physically available in the amount they propose to appropriate. The water is produced in conjunction with coal bed methane development and is stored in, and flows through their pipeline system. Fidelity currently produces water at a rate of at least 2,551 gallons per minute which is equivalent to 4,111 acre-feet per year. Fidelity has this water available for beneficial use and is currently discharging unused water to the Tongue River. (Findings of Fact 12, 13, 15, 17)

Legal Availability

4. Fidelity has proven by a preponderance of the evidence that the water applied for is legally available. The water has been shown to be physically available and there are no legal demands on the source of supply (the pipeline). The source of supply for

this beneficial use application is the water that is produced through the development of coal bed methane. This water is withdrawn under the prior jurisdiction of the Montana Board of Oil and Gas Conservation (Mont. Code Ann. § 85-2-510). No appropriation authorized by the Department of Natural Resources and Conservation is required for that withdrawal, but Fidelity must manage that water in any of the following ways:

- a. as irrigation or stock water or for other beneficial uses in compliance with Title 85, chapter 2, part 3;
- b. reinjected to an acceptable subsurface strata or aquifer pursuant to applicable law;
- c. discharged to the surface or surface waters subject to the permit requirements of Title 75, chapter 5; or
- d. managed through other means allowed by law.

(Mont. Code Ann. § 82-11-201)

Because Fidelity controls this water, not through an appropriation but through the jurisdiction of the Montana Board of Oil and Gas Conservation, no prior appropriator is legally entitled to the use of this water. As discussed in the preliminary matters section earlier, my Order of January 3, 2007, effectively closed the door to prior appropriators being able to lay claim to the water produced by coal bed methane development by finding that such water should not be considered a ground water appropriation, but as an appropriation directly from Fidelity's pipeline which Fidelity exclusively controls.

Objectors argument that water is not legally available because of a dispute over the term "excess water" in the Northern Cheyenne – State of Montana Compact is not persuasive. I note that the Northern Cheyenne Tribe did not file an objection to this application and are not parties to this proceeding. Moreover, it is the position of the Montana Reserved Water Rights Commission that this water is not part of the Tribal Water Right. Nonetheless, the source water for Fidelity's application has not been appropriated for beneficial use to any person or entity. If it should someday be determined that Fidelity's water produced through the development of coal bed methane falls into a category that enables the Northern Cheyenne Tribe to make a claim to it, Fidelity has demonstrated that it has the capability to provide that water since it currently discharges almost all of its produced water to the Tongue River. Finally, I find Objectors argument regarding *Confederated Salish & Kootenai Tribes*

v. Stults inapposite. That case involved an application for the appropriation of water under the jurisdiction of the Department of Natural Resources and a Tribe that does not have a water right settlement with the State, and hence, as yet undefined rights. In the case of the Northern Cheyenne Tribe, their water right is defined and settled. (January 3, 2007 Order; Findings of Fact 18, 19, 20; TR-2)

Adverse Affect

5. Fidelity has proven by a preponderance of the evidence that the water rights of prior appropriators under existing water rights, certificates, permits, or state water reservations will not be adversely affected. For purposes of this beneficial use application the source of supply is the water produced and flowing through Fidelity's pipeline as a result of coal bed methane development. The water is already out of the ground and this is the water that Fidelity seeks to put to beneficial use. As discussed above, because there are no senior water right holders who have a interest in this source of supply, no call can be made on this source of supply by any appropriator even when downstream Tongue River water users are in short supply. The issue as to whether a senior appropriator can call the water in the ground prior to its production in the coal bed methane process is a separate issue from the one at bar. As previously indicated, the water arrives at the surface through the jurisdiction of the Montana Board of Oil and Gas Conservation. At issue in this case is only so much of the water that is out of the ground. Fidelity is the first person to seek appropriation of the water out of the ground, i.e., the first appropriator on the source. (January 3, 2007, Order; Finding of Fact 21)

Adequacy of Appropriation Works

6. Fidelity has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The appropriation works are currently in place and functioning and discharging more water than is being applied for in this application. (Findings of Fact 14, 15, 22)

Beneficial Use

7. Marketing of water is clearly recognized in Montana law. The Montana Constitution provides: "[t]he use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . ." Mont. Const. Art. IX, §3(2); see also Mont. const. Art. III, § 15 (1889); e.g. *Ellinghouse v. Taylor* (1897), 19 Mont. 462;

Bailey v. Tintinger, 45 Mont. 154 (1911); *Brennan v. Jones* (1935), 101 Mont. 550; *Sherlock et al. v. Greaves et al.* (1937), 106 Mont. 207. Beneficial use is a use of water for the benefit of *the appropriator, other persons, or the public.* Mont. Code Ann. § 85-2-102(2) In addition, Mont. Code Ann. § 310(4)(v) states “if the water applied for . . . will be marketed by the applicant to other users . . .” Finally, the Department rules state that “[w]ater may be appropriated for beneficial use: . . . (b) by a person for the sale, rent, or distribution to others . . .” Mont. Admin. Rule 36.12.1801

As recognized in KINNEY ON IRRIGATION:

[i]t has been the policy of the legislation in all of the Western States and Territories in this regard to encourage large companies with great financial backing to appropriate the waters of the natural streams or other bodies, construct works, and then sell or rent the water, or at least the use thereof, to the farmers or other consumers.

KINNEY ON IRRIGATION § 703, p. 1209; ALBERT STONE, MONTANA WATER LAW, 72 (1994); 78 AM. JUR. 2d. Waters § 331 (1992).

Montana law has historically recognized the unique nature of an appropriation for sale or rent in that the water sold is ultimately used by a third party, not the appropriator. Consequently, the appropriator was deemed under the applicable law to have a valid appropriation when its facilities were complete and the water was available for sale. E.g. *Bailey v. Tintinger* (1912), 45 Mont. 154, 122 P. 575. In this case, Fidelity’s infrastructure is in place and it is ready to offer water for sale. If Fidelity does not proceed to market all of the water as proposed, any of the water not marketed will be subject to challenge as beneficial use is the basis, measure, and limit of all rights to use of water in Montana. *McDonald v. State* (1986), 220 Mont. 519, 722 p.2d 598; Mont. Code Ann. § 85-2-315.

8. Through Fidelity’s marketing plan for the water produced through coal bed methane development, Fidelity enters into water use agreements or contracts with the end users of the marketed water. These end uses of water include industrial, and agricultural uses – all recognized beneficial uses. (Findings of Fact 23, 24, 25; Mont. Code Ann. § 85-2-102(2))
9. Fidelity’s managed irrigation program is a process of using water produced through coal bed methane development to irrigate crops in an intensively managed manner. Managed irrigation is a form of irrigation which uses water which may not have been suitable for irrigation by employing scientific and agronomic practices to utilize that

- water to grow crops without damaging the crop or soil resources. Fidelity does not propose to market water for any other type of irrigation. (Findings of Fact 28, 29)
10. Fidelity has proven by a preponderance of the evidence that it has a bona fide intent to put the water produced through coal bed methane to beneficial use by distributing that water to end users. In *Adjudication of the Existing Water Rights to the Use of All the Water*, 311 Mont. 327, 55 P.3d 396, (2002), the Montana Supreme Court explained that intent to appropriate is to be determined from the specific facts and circumstances pertaining. Citing *Wheat v. Cameron* (1922), 64 Mont. 494, 210 P. 761, “A claimant’s intent at the time of appropriation must be determined by his act and by surrounding circumstances, its actual and contemplated use, and the purpose thereof.” *Tohey v. Campbell*, 24 Mont. 13, 60 Pac. 396. The Court went on to say “[i]n accordance with the historical flexibility of the doctrine of prior appropriation, the *Wheat* Court held that although intent could be *presumed* from actual diversion, intent could be proven through other facts and surrounding circumstances. *All the Water*, at 337. In the instant proceeding, it is clear that Fidelity’s intent is indeed to put the water which it exclusively controls to beneficial use.
- In the case of water marketing, an applicant identifies a proposed project and an amount of water that they intend to put into the market upon completion of the works. If the applicant shows the sufficient intent to put the water to a beneficial use a permit may be issued. Cf. *Bailey v. Tintinger*, 45 Mont. 154; *All the Water*, 311 Mont. 327. A *perfected* appropriation is not obtained until an amount of water is actually put to beneficial use, but the applicant’s bona fide intent to appropriate an amount of water is sufficient for them to obtain an *inchoate* right to an appropriation. In the case at bar Fidelity already has obtained control of the water proposed to be used, the water distribution system is in place, and they have clearly shown the intent to put the water to beneficial use. I find that the amount of water which Fidelity seeks to put to beneficial use is reasonable needed for that use. (Findings of Fact 23, 24, 25, 26, 27)
11. Fidelity has proven by a preponderance of the evidence that managed irrigation is a beneficial use. (Findings of Fact 28, 29)

Possessory Interest

12. Fidelity has shown that it has a possessory interest in the lands which comprise the CX field and within which their pipeline system is contained. (Finding of Fact 30)

13. Fidelity's pipeline functions essentially like a reservoir. (Finding of Fact 14)
14. Fidelity's proposed water marketing plan is analogous to the Tongue River Dam and Tongue River Water User's project. (Findings of Fact 10, 23, 24, 25, 32)
15. Fidelity has proven by a preponderance of the evidence that it has a possessory interest in the CX Field and its pipeline system and that it has or will obtain the written consent of the end users with the possessory interest in the property where the water will ultimately be put to use through their entering into individual water use agreements with landowners. (Findings of Fact 23, 25, 26)

Water Quality

16. Fidelity has proven by a preponderance of the evidence that the water quality of a prior appropriator will not be adversely affected. By switching from a direct discharge of water produced through coal bed methane development into the Tongue River, as is done currently, to applying the water to beneficial use through managed irrigation, it is reasonable to expect an improvement in river water quality. Objectors main concern seems to be that even by switching to managed irrigation, there may be mistakes made which result in return flows to the Tongue River resulting in adverse impacts to water quality. Such concerns are speculative at best. The record clearly shows that the objective of managed irrigation is to minimize or eliminate return flows by closely monitoring the amounts of water applied to fields. In *City of Helena*, Final Decision, Permit #19084-s411 (1981) *denied on other grounds*, it was stated "[a]lthough mismanagement of facilities could cause pollution of Helena Valley Canal, such deleterious effect is not the inevitable consequence of applicant's plan. It is entirely speculative that such mismanagement will occur. Held, no adverse effect to canal." Objectors present evidence that show increases in EC and SAR at locations in excess of 100 miles downstream but point to no specific source for those increases. In *Houston*, Final Decision, Permit #60117-g76L (1987), the Department found that:

Applicant's initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. . . . If objector does not meet his burden, and the applicant's description does not show adverse effect on its face, applicant's burden of proof is satisfied by his initial production.

Objectors concerns about decreases in river water quality have not been tied to

Fidelity's proposal to market water produced from coal bed methane development.
(Findings of Fact 38 – 44)

Conclusion

The Department recognizes the unique nature of this permit application and the fact that this source of water will not be available indefinitely (Finding of Fact 16), it is concluded that all of the criteria of Mont. Code Ann. § 85-2-311 have been met and that the applicant has a bona fide intent to place this water to beneficial use instead of discharging all of it to the Tongue River. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria of a beneficial water use permit. (Mont. Code Ann. § 85-2-312)

Proposed Order

Subject to the terms, conditions, and limitations listed below, Application for Beneficial Water Use Permit No. 42B-30011045 to market water produced through the development of coal bed methane wells in the amount of 2400 gallons per minute (5.35 cubic feet per second) up to a volume of 3,863 acre-feet per year and to distribute the water to potential users in Big Horn County, Montana in the area of the CX Field encompassing all sections in T9S, R39E; Sections 4 – 9 and Sections 17 – 36, T9S, R40E; S1/2 Section 35, T8S, R41E; and all sections in T9S, R41E. The beneficial uses of the water are for water marketing (for industrial use, irrigation and stock watering), and the period of appropriation is from January 1 through December 31.

1. This permit is valid only for water produced through the development of coal bed methane gas within the CX Field. No right to the use of water is granted from any other source. At such time that any individual coal bed methane well becomes non-productive, Fidelity shall not have a right to continue withdrawal of water from such well. At such time that water produced from coal bed methane within the CX Field ceases this permit becomes void.
2. Fidelity Exploration and Production Company will not market or distribute water produced through coal bed methane development under this permit unless and until Fidelity enters into water marketing agreements with end users which identify the lands where the water is ultimately used.

APPLICATION 42B-30014358 (Wyoming Application)

Findings of Fact

General

1. Application for Beneficial Water Use Permit No. 42B-30014358 in the name of Fidelity Exploration and Production Company was filed with the Department on March 2, 2005. (Department file)
2. Notice of the Application was properly made in the *Big Horn County News* on June 8, 2006. (Department file)
3. The Environmental Assessment (EA) dated June 13, 2006, prepared by the Department for this application was reviewed and is included in the Department's file for this application. (Department file)
4. Fidelity seeks to obtain a Beneficial Water Use Permit to market water produced through the development of coal bed methane wells in the amount of 1860 gallons per minute (5.35 cubic feet per second) up to a volume of 3,000 acre-feet per year in the State of Wyoming. Fidelity proposes to distribute water produced in their Montana CX Field to potential users in Sheridan County, Wyoming. The CX Field includes all sections in T9S, R39E; Sections 4 – 9 and Sections 17 – 36, T9S, R40E; S1/2 Section 35, T8S, R41E; and all sections in T9S, R41E. The proposed beneficial uses of the water are for water marketing (for industrial use, irrigation and stock watering). The proposed period of appropriation is from January 1 through December 31. (Department file, Application # 42B-30014358)
5. The CX field is located upstream and adjacent to the Tongue River reservoir. (Department file)
6. Objector NPRC's membership includes persons with water rights on the Tongue River downstream of the CX Field. (Testimony of Mark Fix at Vol. II 11:5 through 12:18; NP-5)
7. The Fix ranch is located more that 100 river miles downstream of the Tongue River Dam and reservoir. (Testimony of Mark Fix Vol. II 35:18 – 24; NP -5)
8. Objector TRWUA's membership includes persons with contract water from the Tongue River Water User's Association downstream of the CX Field. (Testimony of Mark Fix at Vol. II 11:5 through 12:18; NP-5; Testimony of Art Hayes at Vol. II 63:6 through 63:14)
9. The Hayes ranch is located approximately 40 miles downstream of the Tongue River Dam. (Testimony of Art Hays Vol. II 65:16)

10. Objector SWPB holds a water right on the Tongue River to store, control and/or divert all unappropriated water of the Tongue River for storage behind the Tongue River Dam for the purposes of marketing that water through the Tongue River Water Users' Association. (TR-5)
11. Objector Terry Punt has water rights on a tributary (Hanging Woman Creek) to the Tongue River which enters the Tongue River downstream of the CX Field. (Department file)

Physical Availability

12. The water Fidelity proposes to use is withdrawn from coal bed methane wells and is stored and or transported through Fidelity's closed pipeline system. In January 2007, the approximate yield of water produced from those wells is equivalent to 4,138 acre-feet per year. (Testimony of Bruce Williams, pp. 6)
13. The vast majority of the water produced from Fidelity's coal bed methane wells is currently discharged to the Tongue River under authority of two MPDES permits (one permit is for the discharge of untreated water in the amount of 1600 gpm from July – October, 2500 gpm from November – February, and 2350 gpm from March – June; the second permit is for treated water in the amount of approximately 650 gpm) with the remainder providing industrial use (mostly dust suppression) at the Spring Creek and Decker coal mines, and to local landowners for stock watering and wildlife uses. (Testimony of Bruce Williams, pp. 3)
14. Fidelity's pipeline facility essentially functions like a reservoir in that water is stored in the pipeline and there is a certain volume flowing into and out of it. Fidelity's pipeline system is a closed system limiting losses such as from evaporation. (Testimony of Mark Brooke, pp. 4 – 5)
15. As the number of wells and amount of coal bed methane production increases, the amount of water produced from that production increases. As of November 30, 2006, the amount of water produced from Fidelity's CX Field was 2,551 gallons per minute (gpm). (A-11, A-12)
16. The quantity of water produced from coal bed methane will not remain stable through the life of the gas field. As more wells are installed and more gas is produced, water quantity will increase. As the amount of gas produced over the years begins to decline, water production will concomitantly decrease. (A-1; Williams redirect at Vol. I 103:2 – 4)

17. 2,551 gpm is equivalent to 4,115 acre-feet per year. (Hearing Examiner calculation)

Legal Availability

18. The water stored in and flowing through Fidelity's pipeline system is under the exclusive control of Fidelity and no person has access to those facilities to establish a senior water right. (Testimony of Bruce Williams at pp. 7)
19. While the Objectors raised the issue of a claim by the Northern Cheyenne Tribe to water produced from coal bed methane pursuant to the Water Compact between the State of Montana, the Northern Cheyenne Tribe, and the United States (Mont. Code Ann. § 85-20-301 et seq.), the position of the Montana Reserved water Rights Compact Commission on behalf of the State is that coal bed methane water is not part of the Tribal Water Right. (A-13; A-14)
20. There are no existing legal demands on the source of supply. The source of supply is water produced by Fidelity's development of coal bed methane which is withdrawn along with their gas under the jurisdiction of the Montana Board of Oil and Gas Conservation. (Testimony of Mark Brooke at pp. 7 – 8; Department File; Testimony of Bruce Williams at pp. 6)

Adverse Affect

21. The water that Fidelity intends to put to beneficial use is from the water stored in and flowing through Fidelity's pipeline which cannot be relied upon by any other surface or groundwater user. (Testimony of Mark Brooke at pp. 7; Department file)

Adequacy of Appropriation Works

22. Fidelity's pipeline system is currently in place and being used to deliver water to permitted discharge points under MPDES permits issued by the Department of Environmental Quality. The system is dynamic and will grow and ultimately shrink as wells cease to produce coal bed methane gas. The system in place as of November 30, 2006, was handling 2,551 gpm. The system has been steadily growing since at least 1999 and is expected to increase further as more gas wells are developed. (Testimony of Bruce Williams at pp. 7; A-11)

Beneficial Use

23. The proposed beneficial use is for distribution or marketing of the water produced in conjunction with coal bed methane production. (Testimony of Bruce Williams at pp.

- 8; Department file; Testimony of Kevin Harvey at pp. 3)
24. Fidelity intends to distribute water from the pipeline to persons who enter into water distribution contracts with Fidelity. (Testimony of Bruce Williams at pp. 8; Testimony of Kevin Harvey at pp. 3)
 25. Fidelity intends that the end beneficial uses in its marketing of water will be industrial use (dust suppression, process water, well drilling and completion, and fire control), agricultural use (irrigation, stock watering, and wildlife) (Testimony of Kevin Harvey at pp. 3 – 4; Department file)
 26. Fidelity has identified four locations where water produced from coal bed methane development is being or will be used in Wyoming.
 - a. Seven Brothers Ranch: 875 acre-feet per year for irrigation of 350 acres of alfalfa/grass at 30 inches per year. (NP-1)
 - b. Youngs Creek Ranch: 250 acre-feet per year for irrigation of 100 acres of alfalfa/grass at 30 inches per year. (NP-1)
 - c. Dewey Ranch: 350 acre-feet per year for irrigation of 140 acres of alfalfa/grass at 30 inches per year. (NP-1)
 - d. Fidelity's own use: 32 acre-feet per year for industrial use (drilling, dust suppression and abatement, etc.) (NP-2)

All of the above listed uses appear to be currently met using water produced from coal bed methane development in Wyoming. (NP-1; NP-2)

27. Fidelity intends to enter into further distribution contracts with landowners to use the produced water for both stock water and managed irrigation. Fidelity anticipates being able to sign agreements to provide up to 575 acre-feet for sites currently under investigation. (Testimony of Bruce Williams at pp. 8; NP-1; NP-2)
28. Managed irrigation is an irrigation practice which employs soil science, water chemistry, agricultural engineering and agronomic principles to utilize water produced from coal bed methane operations to produce forage while protecting soil physical and chemical properties. (Testimony of Kevin Harvey at pp. 4 – 5; A-8.1)
29. Managed irrigation has been successfully utilized in the Powder River Basin to grow crops. (Testimony of Kevin Harvey at pp. 5 – 7; A-9.1, 9.2, 9.3)

Possessory Interest

30. Fidelity has a possessory interest in the lands which comprise the CX Field and their pipeline system through their gas leases. (Testimony of Bruce Williams at pp. 9)

31. Other than water for its own use or for its subsidiary (Seven Brothers Ranch) Fidelity does not have a possessory interest in the property where a water distribution contract is appurtenant. (Testimony of Bruce Williams at pp. 8)
32. The state of Montana is the owner of water rights stored behind the Tongue River Dam. The Tongue River Water Users purchase 40,000 acre-feet from the State and then sells that water to individual water users. (TR-5; Testimony of Art Hayes Vol. II 89:16 – 96:25)

Water Quality

33. Water produced through the development of coal bed methane generally has low to moderate levels of salinity but elevated levels of sodium and bicarbonate ions. (A-8.1)
34. Elevated levels of sodium in coal bed methane produced waters has a potential adverse affect on soil infiltration and permeability, especially in soils with high clay content. (A-8.1)
35. The ratio of sodium to calcium and magnesium (sodium adsorption ratio or SAR) is used to measure the hazard related to sodium abundance. (A-8.1)
36. Bicarbonate present in irrigation water will react with available calcium and magnesium and form insoluble precipitates. This reaction raises the effective SAR of the water. High values of bicarbonate can also cause an increase in the pH and accompanying increases in SAR. (A-8.1)
37. Salinity (measured by electrical conductivity or EC or alternatively as specific conductance or SC) can inhibit plant growth by hindering the plant's ability to extract water from the soil. Plant species vary with respect to salt tolerance. (A-8.1; Testimony of Mark Fix at Vol. II 19:11 – 18)
38. Fidelity currently discharges both treated and untreated water produced from coal bed methane development directly into the Tongue River under the authority of two MPDES permits. (Testimony of Bruce Williams at pp. 3)
39. Chemical water quality of rivers is highly dependant on the flow at the time of sampling. (Hearing Examiner knowledge)
40. The chemical water quality parameters of rivers generally tend to decrease as streamflow increases and increase as streamflow decreases. (Hearing Examiner knowledge; Testimony of Mark Fix Vol. II 42:16 – 20)
41. The lowest EC values in the Tongue River at the Miles City gage occur when the

- river flow is high (over 1,000 cfs) and the highest EC values generally occur during periods of low flow. The highest river flow where the EC exceeded 1,000 was 590 cfs. (NP-6)
42. The EC levels in the Tongue River at the Miles City gage during June through the first half of September 2006 were greater than 1,000 most of the time. During that time period river flows did not exceed 27 cfs. (Testimony of Mark Fix Vol. II 25:11 – 21)
 43. Fidelity's managed irrigation practices are designed to prevent and control irrigation runoff. (Testimony of Kevin Harvey at pp. 5; A-8.1)
 44. Managed irrigation has been successfully utilized by Fidelity in Wyoming with no observable excessive runoff. (A-9.1; A-9.3)

Transportation and Use of Water Outside of Montana

45. There currently exists a water shortage in the State of Montana including within the Tongue River basin. (Testimony of Bruce Williams at pp. 13; A-2; A-5; Testimony of Mark Fix Vol. II 55:4 – 9)
46. Fidelity's current managed irrigation in Wyoming is being accomplished with water produced from coal bed methane wells located in Wyoming. (NP-1; NP-2; Testimony of Kevin Harvey Vol. II 210:8 – 17; See *Generally* Testimony of Bruce Williams Vol. I 43:6 – 47:14)
47. Montana is currently involved in an interstate water lawsuit with the state of Wyoming in which Montana alleges that Wyoming has not delivered to Montana all of the water due it under the Yellowstone River Compact. (Testimony of Bruce Williams at pp. 13; A-5; Testimony of Mark Fix Vol. II 29:24 – 30:1; Testimony of Art Hayes Vol. II 68:11 – 15)
48. The only identified benefits of transporting water produced from coal bed methane development in Montana for use in Wyoming are that it will minimize discharge of water into the river thus purporting to cause less negative effect of the quality of the river water. In addition, Fidelity relies on the fact that by managing water in the manner proposed Montana will benefit by promoting coal bed methane development in Montana and the associated royalties that come with that benefit. (Testimony of Bruce Williams at pp. 14; Testimony of Bruce Williams Vol. I 54:10 – 55:3; See *Generally* Vol. I 62:3 – 63:18)
49. Fidelity desires to transport water produced through coal bed methane development

in Montana to Wyoming for managed irrigation on lands currently served by water produced from coal bed methane in Wyoming because the Wyoming produced waters are in decline. (Testimony of Bruce Williams at pp. 14)

Conclusions of Law

General

1. The Department has jurisdiction and **may not** issue a provisional permit for the withdrawal and transportation of water for use outside the state unless the applicant proves the criteria in Mont. Code Ann. § 85-2-311(4) by clear and convincing evidence. (Mont. Code Ann. § 85-2-311(4))
2. Permit No. 42B30014358 may not be issued unless there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seek to appropriate, in the amount requested, based on an analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected; and the proposed out-of-state use of water is not contrary to water conservation in Montana and the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana. (Mont. Code Ann. § 85-2-311(4))

Physical Availability

3. Fidelity has proven by clear and convincing evidence that the water applied for is

physically available in the amount they propose to appropriate. The water is produced in conjunction with coal bed methane development and is stored in, and flows through their pipeline system. Fidelity currently produces water at a rate of at least 2,551 gallons per minute which is equivalent to 4,111 acre-feet per year. Fidelity has this water available for beneficial use and is currently discharging unused water to the Tongue River. (Findings of Fact 12, 13, 15, 17)

Legal Availability

4. Fidelity has proven by clear and convincing evidence that the water applied for is legally available. The water has been shown to be physically available and there are no legal demands on the source of supply (the pipeline). The source of supply for this beneficial use application is the water that is produced through the development of coal bed methane. This water is withdrawn under the prior jurisdiction of the Montana Board of Oil and Gas Conservation (Mont. Code Ann. § 85-2-510). No appropriation authorized by the Department of Natural Resources and Conservation is required for that withdrawal, but Fidelity must manage that water in any of the following ways:
 - a. as irrigation or stock water or for other beneficial uses in compliance with Title 85, chapter 2, part 3;
 - b. reinjected to an acceptable subsurface strata or aquifer pursuant to applicable law;
 - c. discharged to the surface or surface waters subject to the permit requirements of Title 75, chapter 5; or
 - d. managed through other means allowed by law.

(Mont. Code Ann. § 82-11-201)

Because Fidelity controls this water, not through an appropriation but through the jurisdiction of the Montana Board of Oil and Gas Conservation, no prior appropriator is legally entitled to the use of this water. As discussed in the preliminary matters section earlier, my Order of January 3, 2007, effectively closed the door to prior appropriators being able to lay claim to the water produced by coal bed methane development by finding that such water should not be considered a ground water appropriation, but as an appropriation directly from Fidelity's pipeline which Fidelity exclusively controls.

Objectors argument that water is not legally available because of a dispute over the

term “excess water” in the Northern Cheyenne – State of Montana Compact is not persuasive. I note that the Northern Cheyenne Tribe did not file an objection to this application and are not parties to this proceeding. Moreover, it is the position of the Montana Reserved Water Rights Commission that this water is not part of the Tribal Water Right. Nonetheless, the source water for Fidelity’s application has not been appropriated for beneficial use to any person or entity. If it should someday be determined that Fidelity’s water produced through the development of coal bed methane falls into a category that enables the Northern Cheyenne Tribe to make a claim to it, Fidelity has demonstrated that it has the capability to provide that water since it currently discharges almost all of its produced water to the Tongue River. Finally, I find Objectors argument regarding *Confederated Salish & Kootenai Tribes v. Stults* inapposite. That case involved an application for the appropriation of water under the jurisdiction of the Department of Natural Resources and a Tribe that does not have a water right settlement with the State, and hence, as yet undefined rights. In the case of the Northern Cheyenne Tribe, their water right is defined and settled. (January 3, 2007 Order; Findings of Fact 18, 19, 20; TR-2)

Adverse Affect

5. Fidelity has proven by clear and convincing evidence that the water rights of prior appropriators under existing water rights, certificates, permits, or state water reservations will not be adversely affected. There are no senior water right holders who have a interest in this source of supply and thus no call can be made on this source of supply by any appropriator even when downstream Tongue River water users are in short supply. For purposes of this beneficial use application the source of supply is the water produced and flowing through Fidelity’s pipeline as a result of coal bed methane development. The water is already out of the ground and this is the water that Fidelity seeks to put to beneficial use. As discussed above, because there are no senior water right holders who have a interest in this source of supply, no call can be made on this source of supply by any appropriator even when downstream Tongue River water users are in short supply. The issue as to whether a senior appropriator can call the water in the ground prior to its production in the coal bed methane process is a separate issue from the one at bar. As previously indicated, the water arrives at the surface through the jurisdiction of the Montana Board of Oil and Gas Conservation. At issue in this case is only so much of the

water that is out of the ground. Fidelity is the first person to seek appropriation of the water out of the ground, i.e., the first appropriator on the source. (January 3, 2007, Order; Finding of Fact 20)

Adequacy of Appropriation Works

6. Fidelity has proven by clear and convincing evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The appropriation works are currently in place and functioning and discharging more water than is being applied for in this application. (Findings of Fact 14, 15, 22)

Beneficial Use

7. Marketing of water is clearly recognized in Montana law. The Montana Constitution provides: “[t]he use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . .” Mont. Const. Art. IX, §3(2); see also Mont. const. Art. III, § 15 (1889); e.g. *Ellinghouse v. Taylor* (1897), 19 Mont. 462; *Bailey v. Tintinger*, 45 Mont. 154 (1911); *Brennan v. Jones* (1935), 101 Mont. 550; *Sherlock et al. v. Greaves et al.* (1937), 106 Mont. 207. Beneficial use is a use of water for the benefit of *the appropriator, other persons*, or the public. Mont. Code Ann. § 85-2-102(2) In addition, Mont. Code Ann. § 310(4)(v) states “if the water applied for . . . will be marketed by the applicant to other users . . .” Finally, the Department rules state that “[w]ater may be appropriated for beneficial use: . . . (b) by a person for the sale, rent, or distribution to others . . .” Mont. Admin. Rule 36.12.1801

As recognized in KINNEY ON IRRIGATION:

[i]t has been the policy of the legislation in all of the Western States and Territories in this regard to encourage large companies with great financial backing to appropriate the waters of the natural streams or other bodies, construct works, and then sell or rent the water, or at least the use thereof, to the farmers or other consumers.

KINNEY ON IRRIGATION § 703, p. 1209; ALBERT STONE, MONTANA WATER LAW, 72 (1994); 78 AM. JUR. 2d. Waters § 331 (1992).

Montana law has historically recognized the unique nature of an appropriation for sale or rent in that the water sold is ultimately used by a third party, not the appropriator. Consequently, the appropriator was deemed under the applicable law to have a valid appropriation when its facilities were complete and the water was available for sale. E.g. *Bailey v. Tintinger* (1912), 45 Mont. 154, 122 P. 575. In this

case, Fidelity's infrastructure is in place and it is ready to offer water for sale. If Fidelity does not proceed to market all of the water as proposed, any of the water not marketed will be subject to challenge as beneficial use is the basis, measure, and limit of all rights to use of water in Montana. *McDonald v. State* (1986), 220 Mont. 519, 722 p.2d 598; Mont. Code Ann. § 85-2-315.

8. Through Fidelity's marketing plan for the water produced through coal bed methane development, Fidelity enters into water use agreements or contracts with the end users of the marketed water. These end uses of water include industrial, and agricultural uses – all recognized beneficial uses. (Findings of Fact 23, 24, 25)
9. Fidelity's managed irrigation program is a process of using water produced through coal bed methane development to irrigate crops in an intensively managed manner. Managed irrigation is a form of irrigation which uses water which may not have been suitable for irrigation by employing scientific and agronomic practices to utilize that water to grow crops without damaging the crop or soil resources. Fidelity does not propose to market water for any other type of irrigation. (Findings of Fact 28, 29)
10. Fidelity has proven by clear and convincing evidence that it has a bona fide intent to put the water produced through coal bed methane to beneficial use by distributing that water to end users. In *Adjudication of the Existing Water Rights to the Use of All the Water*, 311 Mont. 327, 55 P.3d 396, (2002), the Montana Supreme Court explained that intent to appropriate is to be determined from the specific facts and circumstances pertaining. Citing *Wheat v. Cameron* (1922), 64 Mont. 494, 210 P. 761, "A claimant's intent at the time of appropriation must be determined by his act and by surrounding circumstances, its actual and contemplated use, and the purpose thereof." *Tohey v. Campbell*, 24 Mont. 13, 60 Pac. 396. The Court went on to say "[i]n accordance with the historical flexibility of the doctrine of prior appropriation, the *Wheat* Court held that although intent could be *presumed* from actual diversion, intent could be proven through other facts and surrounding circumstances. *All the Water*, at 337. In the instant proceeding, it is clear that Fidelity's intent is indeed to put the water which it exclusively controls to beneficial use.

In the case of water marketing, an applicant identifies a proposed project and an amount of water that they intend to put into the market upon completion of the works. If the applicant shows the sufficient intent to put the water to a beneficial use a permit may be issued. Cf. *Bailey v. Tintinger*, 45 Mont. 154; *All the Water*, 311 Mont. 327. A *perfected* appropriation is not obtained until an amount of water is actually put to

beneficial use, but the applicant's bona fide intent to appropriate an amount of water is sufficient for them to obtain an *inchoate* right to an appropriation. In the case at bar Fidelity already has obtained control of the water proposed to be used, the water distribution system is in place, and they have clearly shown the intent to put the water to beneficial use. I find that the amount of water which Fidelity seeks to put to beneficial use is reasonable needed for that use. (Findings of Fact 23, 24, 25, 26, 27)

11. Fidelity has proven by clear and convincing evidence that managed irrigation is a beneficial use. (Findings of Fact 27, 28)

Possessory Interest

12. Fidelity has shown that it has a possessory interest in the lands which comprise the CX field and within which their pipeline system is contained. (Finding of Fact 30)
13. Fidelity's pipeline functions essentially like a reservoir. (Finding of Fact 14)
14. Fidelity's proposed water marketing plan is analogous to the Tongue River Dam and Tongue River Water User's project. (Findings of Fact 10, 23, 24, 25, 32)
15. Fidelity has proven by clear and convincing evidence that it has a possessory interest in the CX Field and its pipeline system and that it has or will obtain the written consent of the end users with the possessory interest in the property where the water will ultimately be put to use through their entering into individual water use agreements with landowners. (Findings of Fact 23, 25, 26)

Water Quality

16. Fidelity has proven by clear and convincing evidence that the water quality of a prior appropriator will not be adversely affected. By switching from a direct discharge of water produced through coal bed methane development into the Tongue River, as is done currently, to applying the water to beneficial use through managed irrigation, it is reasonable to expect an improvement in river water quality. Objectors main concern seems to be that even by switching to managed irrigation, there may be mistakes made which result in return flows to the Tongue River resulting in adverse impacts to water quality. Such concerns are speculative at best. The record clearly shows that the objective of managed irrigation is to minimize or eliminate return flows by closely monitoring the amounts of water applied to fields. In *City of Helena*, Final Decision, Permit #19084-s411 (1981) *denied on other grounds*, it was stated "[a]lthough mismanagement of facilities could cause pollution of Helena Valley

Canal, such deleterious effect is not the inevitable consequence of applicant's plan. It is entirely speculative that such mismanagement will occur. Held, no adverse effect to canal." Objectors present evidence that show increases in EC and SAR at locations in excess of 100 miles downstream but point to no specific source for those increases. In *Houston*, Final Decision, Permit #60117-g76L (1987), the Department found that:

Applicant's initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. . . . If objector does not meet his burden, and the applicant's description does not show adverse effect on its face, applicant's burden of proof is satisfied by his initial production.

Objectors concerns about decreases in river water quality have not been tied to Fidelity's proposal to market water produced from coal bed methane development. (Findings of Fact 38 – 44)

Transportation and Use of Water Outside Montana

17. In determining whether Fidelity has proved by clear and convincing evidence that the requirements that the proposed out-of-state use of water is not contrary to water conservation in Montana and not otherwise detrimental to the public welfare of the citizens of Montana the Department considers the following factors:
 - a. whether there are present or projected water shortages within the state of Montana;
 - b. whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;
 - c. the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
 - d. the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(Mont. Code Ann. § 85-2-311(4)(c)(i)-(iv)) These are the only criteria which the Department will consider in determining whether the proposed out-of-state use of water is not contrary to water conservation in Montana and not otherwise detrimental to the public welfare of the citizens of Montana. E.g. *Ravalli County v. Erickson*, 2004 MT 35, ¶¶ 11-12, 320 Mont. 31, ¶¶ 11-12, 85 P.3d 772, ¶¶ 11-12 (intention of the legislature determined from the plain meaning of the words used, and if

interpretation of the statute can be so determined, the courts may not go further); *Highlands Golf Club v. Ashmore*, 2002 MT 8, ¶ 20, 308 Mont. 111, ¶ 20, 36 P.3d 697, ¶ 20 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann. § 1-2-101).

18. Fidelity has not proven by clear and convincing evidence that the out-of-state transport of water will not be contrary to water conservation in Montana or that the transport of such water out-of-state will not otherwise detrimental to the public welfare of the state of Montana. It is undisputed in the record that Montana is and has been struggling through an extreme drought. It is also uncontroverted that the State of Montana is in litigation with the State of Wyoming over alleged violations of the Yellowstone River Compact by Wyoming. Moreover, Fidelity admits that “there are present water shortages in Montana and the Tongue River Basin of Montana.” Fidelity Post Hearing Brief at p. 33. I conclude that Montana’s water resources in the Tongue River basin are in short supply and that all of Montana’s water resources are needed for use in Montana. (Findings of Fact 45, 46, 47)
19. I find Fidelity’s argument that water is needed for managed irrigation in Wyoming also unconvincing. Fidelity currently uses water produced from coal bed methane development in Wyoming on their Wyoming fields and contends that Montana water is needed because the Wyoming produced water is in decline. What Fidelity fails to recognize is that eventually Montana’s coal bed methane produced water will also eventually decline and when it is gone it is gone. Fidelity has presented no evidence (other than that the source within Wyoming is in decline) which shows that Montana produced coal bed methane water is needed beyond the supply and sources of water available in Wyoming. (Findings of Fact 16, 46, 47, 48)
20. I also find Fidelity’s argument that the secondary benefit of promoting coal bed methane development (thus increasing royalties benefiting the state of Montana) by transporting the water produced by coal bed methane development in Montana for use in Wyoming to be unconvincing. A review of the record shows that there are alternative methods of managing coal bed methane water within the State of Montana. (Finding of Fact 48)

Conclusion

Fidelity has not shown by clear and convincing evidence that all of the criteria of Mont.

Code Ann. § 85-2-311(4) have been met. The Department **may not** issue a permit for the appropriation of water for withdrawal and transport for use outside the state unless the applicant has shown by clear and convincing evidence all of the applicable criteria. I do not reach Objector's arguments concerning Mont. Code Ann. § 85-2-301 because this application is denied.

Proposed Order

Beneficial Water Use Permit No. 42B-30011045 by Fidelity Exploration and Production Company is **DENIED**.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by April 25, 2007, or postmarked by the same date, and copies mailed that same date to all parties.

No final decision shall be made until after the expiration of the above time period, and due consideration of *timely* oral argument requests, exception, and briefs.

Dated this 5th day of April, 2007.

/Original signed by David A Vogler/

David A. Vogler
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 5th day of April 2007 by first class United States mail.

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/Original signed by Jamie Price/

Jamie Price
Hearings Unit, 406-444-6615

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION NOS.)
42B-30011045 AND 42B-30014358 FOR)
BENEFICIAL WATER USE PERMIT BY)
FIDELITY EXPLORATION)

NOTICE OF ERRATA
PROPOSAL FOR DECISIION

In the Proposal for Decision in this matter, issued on April 5, 2007, on page 17 and 32 there are clerical errors.

On page 17, under the **Proposed Order** section, the second line of the first sentence should read:

“...Water Use Permit No. 42B-30011045 is **GRANTED**...”

On page 32, under the **Proposed Order** section, the sentence should read:
“Beneficial Water Use Permit No. 42B-30014358 by Fidelity Exploration and Production Company is **DENIED**.”

Dated this 6th day of April, 2007.

/Original signed by David A Vogler/

David A. Vogler
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the NOTICE OF ERRATA - PROPOSAL FOR DECISION was served upon all parties listed below on this 6th day of April 2007 by first class United States mail.

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